No. 92-689

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IN THE

Supreme Court of the United States

October Term, 1992

JACQUELINE McMILLAN,
Petitioner,

vs.

ISAAC C. HUNT, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER AN INDIVIDUAL WAS DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF LAW AS MANDATED BY THE CONSTITUTION OF THE UNITED STATES WHERE SHE WAS EXPELLED FROM A STATE UNIVERSITY AFTER BEING ARBITRARILY CHARGED WITH NON-ACADEMIC VIOLATIONS AND WHERE EXPULSION PROCEDURES WERE INADEQUATE TO INSURE AGAINST THE ERRONEOUS DEPRIVATION OF HER PROPRIETARY INTERESTS.

PARTIES TO THE PROCEEDING

Petitioner

1. Jacqueline McMillan

Respondents

1. Issac C. Hunt, Jr., Dean, University of Akron, College of Law
2. The University of Akron, Board of Trustees
3. William V. Muse, President, University of Akron

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No. _____

IN THE

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October Term, 1992

JACQUELINE McMILLAN,
Petitioner,

vs.

ISAAC C. HUNT, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Jacqueline McMillan, respectfully requests that a writ of certiorari issue to review the July 21, 1992 Opinion and Order of the United States Court of Appeals for the Sixth Circuit, Case No. 91-3843.

OPINIONS BELOW

Opinion of the United States Court of Appeals for the Sixth Circuit, Case No. 91-3843 (July 1, 1992) (A1).

Order of Dismissal of the United States District Court, Northern District of Ohio, Eastern Division, Case No. 5:91CV01634 (August 30, 1991) (A5).

Findings of Fact and Conclusions of Law of the United States District Court, Northern District of Ohio, Eastern Division, Case No. 5:91CV01634 (August 30, 1991) (A6).

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JURISDICTIONAL STATEMENT

On July 21, 1992, the United States Court of Appeals for the Sixth Circuit entered judgment in case number 91-3843. A suggestion for rehearing *en banc* filed on behalf of the Plaintiff-Appellant therein, Petitioner herein, was denied on September 1, 1992. The jurisdiction of this Honorable Court is invoked by Petitioner pursuant to 28 U.S.C. Section 1254(1) to review the opinion and order of the appellate court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

THE CONSTITUTION OF THE UNITED STATES:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE;

42 U.S.C. §1983, Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Jacqueline McMillan ("Petitioner" hereinafter) began law school at the University of Akron in the Fall of 1990. Through a housing service, Petitioner entered into an apartment sharing arrangement with Sara Rich and Julie Rohr, both of whom were also law students. Petitioner and Sara Rich were both enrolled in a class entitled Basic Legal Communications (BLC). The BLC course was divided into several groups, each with its own professor. Each of those professors was under the overall supervision of Professor Richard Cohen. Petitioner and Sara Rich were in the same BLC group. As part of the BLC class, each student was required to submit three legal memorandums during the course of the Fall semester. The pending case revolves around the third and final memorandum. The memorandum required each student to address the identical issue. The students were to research and write their memorandum independently. Working in groups or sharing research was not permitted. Both Petitioner and Sara Rich turned in their memorandum timely.

Professor Cohen received a phone call from the professor in charge of the BLC group in which both Petitioner and Sara Rich were enrolled. The professor informed Cohen that there "was a problem with two papers in her class". The papers in question were those of Petitioner and Sara Rich. Based solely on review of the two papers, Cohen "decided there was definitely a problem here, more then likely some Honor Code violation". Professor Cohen testified that although he was convinced that there had been a violation by one of the two students it was impossible, based solely on the papers, to make a determination as to who had committed the violation, or if both had done so.

Although he had already decided that there was "definitely" a violation of the Code, Cohen did not refer the situation to the Student Disciplinary Committee. Instead, Cohen conducted his own investigation into the matter. Upon conclusion of his unofficial investigation Cohen referred the situation to the Committee and accused Petitioner only of violating the Code. In accordance with the Code, an investigation was undertaken by an investigator appointed by the Chairperson of the Committee. When the investigation was completed a report was submitted. The report presented three possible hypotheses: (1) Petitioner violated the Code; (2) Sara Rich violated the Code; (3) Both Petitioner and Sara Rich violated the Code. Based on the foregoing report, the Chairperson found probable cause to proceed against Petitioner only. Cohen and Sara Rich testified against Petitioner at the disciplinary hearing. Neither witness was placed under oath.

Prior to the date of the hearing Petitioner, through counsel, filed an objection to having Professor Grant and a student, Timothy Sheriden, as voting members of the Committee for purposes of the hearing. Petitioner contended that Grant could not be impartial because he had already made an arbitrary probable cause determination and should, therefore, be removed as a voting member of the Committee. Tim Sheriden had previously had an altercation with Petitioner over parking at the apartment complex where both lived. Sheriden believed Petitioner owed him twenty-five dollars ($25.00) because he was unable to get to work one day because his car was blocked by Petitioner's car. Petitioner asked that Sheriden be removed on the basis of personal bias. Petitioner was not given the opportunity to question either individual as to their potential bias. Neither individual was removed from the Committee.

The Code states that "[a] finding of a violation requires an affirmative vote of Sixty Percent (60%) of the participating members." Upon conclusion of the hearing, the Committee voted 5-2 that Petitioner had violated the Code. Pursuant to the Code, Petitioner appealed the decision of the Committee to the Dean of the Law School. The Code requires the Dean to "give substantial deference" to the findings of the Committee. The Code specifically states that the appeal procedures to the dean, as outlined therein are "the only procedures available respecting review" of the Committee's actions.

On August 20, 1991, Petitioner filed a complaint pursuant to 42 U.S.C. Section 1983 in the United States District Court for the Northern District of Ohio, Eastern Division. The Complaint named the dean of the College of Law, the president of The University of Akron and the university's Board of Trustees as defendants ("Respondent" hereinafter). The Complaint alleged that Respondent's decision to expel Petitioner was arbitrary and capricious and in violation of her constitutional rights to procedural and substantive due process. Petitioner sought a temporary restraining order and both preliminary and permanent injunctive relief. A hearing was held on August 26, 1991. On August 30, 1991, the District Court announced its Findings of Fact and Conclusions of Law wherein it denied the relief requested and dismissed the complaint. A Notice of Appeal to the United States Court of Appeals, Sixth Circuit, was filed on September 9, 1991. On July 21, 1992, the federal appeals court affirmed the judgment of the district court. Petitioner's motion for rehearing *en banc* was denied by the Sixth Circuit on September 1, 1992.

REASONS FOR ALLOWANCE OF WRIT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WHICH HELD THAT PETITIONER HAD NOT BEEN DENIED SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF LAW AS MANDATED BY THE CONSTITUTION OF THE UNITED STATES WHERE THE PETITIONER WAS EXPELLED FROM A STATE UNIVERSITY AFTER BEING ARBITRARILY CHARGED WITH NON-ACADEMIC VIOLATIONS AND WHERE EXPULSION PROCEDURES WERE INADEQUATE TO INSURE AGAINST ERRONEOUS DEPRIVATION OF A PROPRIETARY INTEREST CONFLICTS WITH THE PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

In *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985), this Court held that a student who had been expelled from a state university for academic reasons was not denied substantive due process of law where the procedures used by the university were not "unfair in any respect" and there were no facts in the record which disclosed arbitrary action. *Id.*, at 223-225. The pending case presents this Court with the antithesis of the holding in *Ewing, supra.*

In the case now before this Court the Petitioner was expelled for disciplinary reasons. This Court has long recognized the inherent differences between disciplinary and academic dismissals. As stated in *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978):

> "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the

> violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal. (at 86)
>
> * * *
>
> "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. (at 89)

In the pending case, the hearing held before the Student Disciplinary Committee was *not* for the purpose of determining whether Petitioner had the "ability to perform adequately" as a lawyer, nor was it for the purpose of determining whether she was "making insufficient progress toward that goal." *Horowitz, supra,* at pp. 89-90. The purpose of the hearing was to determine whether Petitioner had committed a theft of another student's work and attempted to submit it as her own. She was charged with commission of a "dishonest" act. The adversarial nature of the case called for stringent procedural requirements.

The Sixth Circuit Court of Appeals did not address the issue of academic versus disciplinary action and held that because Petitioner had notice of the charges against her and a hearing wherein she was represented by counsel, adequate procedures were utilized. Given the nature of the proceedings and the severity of the possible punishments, Petitioner was entitled to more. The witnesses against Petitioner were not placed under oath. The significance of the lack of sworn testimony is amplified by the arbitrary manner in which Petitioner was brought before the Committee. The investigator assigned by the Chairperson of the Student Disciplinary Counsel submitted the following findings:

> There are five possible explanations for the similarity between Ms. McMillan's and Ms. Rich's memoranda: (1) coincidence; (2) collaboration between Ms. McMillan and Ms. Rich; (3) Ms. McMillan's coping (sic) of Ms. Rich's work without Ms. Rich's knowledge or assent; (4) *Ms. Rich's copying of Ms. McMillan's work without Ms. McMillan's knowledge or assent;* or (5) Ms. McMillan's and Ms. Rich's copying of yet another person's work, either independently of or in collaboration with each other. My investigation has uncovered no evidence to support hypothesis (5), although I cannot conclusively rule it out. Hypothesis (1) is improbable in light of the high degree of similarity between the two memoranda.
>
> There is no dispute that the conduct that would be entailed by hypotheses (2), (3), and (4) above was unpermitted by the instructor. Such conduct would violate the Student Disciplinary Code ***. (Report of Professor Rich at Pg. 4, emphasis added.)

Despite the investigator's determination that Ms. Rich was as likely to have violated the Code as Petitioner, an arbitrary decision was made to proceed against Petitioner alone. Accordingly, the only other possible perpetrator of the violation was allowed to testify on behalf of the accusator without being placed under oath. Ms. Rich was in the position of either lying or being expelled herself yet she wasn't even asked to swear to the truthfulness of her statements. Compounding the fundamental unfairness of the procedures used was the unsworn testimony of Professor Cohen who was allowed to give his opinion as to the guilt and truthfulness of Petitioner. The disciplinary committee was made aware that either Petitioner or Ms. Rich had violated the Code but that the Chairperson of the very committee on which they sat had already determined that Ms. Rich was not the perpetrator. As a result thereof, Petitioner was

brought before the committee bathed in a presumption of guilt. In the district court hearing on this matter the Chairperson of the Committee, who also presided over the disciplinary hearing as a voting member, stated that he would have voted to "acquit" Petitioner had "the evidence adduced at the hearing convinced me she was *not guilty*." Due process demands impartiality of those who function in judicial or quasi-judicial capacities. *Marshall v. Jerrico, Inc.*, 466 U.S. 238, 242-243, 64 L. Ed. 2d 182, 100 S.Ct. 1610, 1613-1614 (1980).

While constitutional guarantees of Due Process may not require the equivalent of a criminal trial in the pending case they do mandate fundamental fairness. A presumption of innocence and an indicia of reliability of the truthfulness of the evidence presented should be a minimal requirement. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). The State of Ohio, through its political subdivision, the University of Akron, arbitrarily selected Petitioner for prosecution. She was then denied a meaningful chance to defend the charges against her as the result of inadequate procedures. As a result, Petitioner was deprived of her proprietary interest in her continued enrollment at the University of Akron, College of Law.

CONCLUSION

Petitioner was arbitrarily charged with a violation of the Student Disciplinary Code by Respondent. The charges against Petitioner did not challenge her ability to perform adequately as a law student but instead alleged the commission of a dishonest act. Given the nature of the charges against her and the severity of the punishment to which she was subjected, the procedures used by Respondent were inadequate. As a direct result thereof, Petitioner was deprived of property without due process of law as mandated by the fifth and fourteenth amendments to The Constitution of the United States. The Sixth Circuit Court of Appeals erred when it affirmed the judgment of the district court. The opinion and order of the circuit court conflicts with the applicable decisions of this Court.

For all the reasons stated above, the Writ of Certiorari should be allowed.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed July 21, 1992)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

No. 91-3843

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE McMILLAN,
Plaintiff-Appellant,

v.

ISAAC C. HUNT, JR., *et al.*,
Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MARTIN and SUHRHEINRICH, *Circuit Judges*; and KRUPANSKY, *Senior Circuit Judge.*

PER CURIAM. Jacqueline McMillan appeals the district court's dismissal of her complaint in which she sought injunctive relief against various officials of the University of Akron College of Law. McMillan alleges the law school violated her substantive and procedural due process rights when it dismissed her from the law school on the grounds of academic dishonesty.

As a first year student at the University of Akron College of Law, McMillan was enrolled in the required legal writing course entitled "Basic Legal Communications." Richard Cohen was McMillan's legal writing professor. In January of 1991, after making an independent investigation, Cohen notified McMillan that he was charging her with a violation of the school's honor code arising from McMillan's third research paper. After comparing McMillan's paper to that of Sara Rich, who was McMillan's roommate and classmate, and after talking with the two students, Cohen believed that McMillan plagiarized Sara Rich's work. Professor William Rich was appointed by Professor Richard Grant, Chair of the Student Disciplinary Committee, to investigate Cohen's charge. After reviewing the results of the investigation, Grant found that there was probable cause to believe that McMillan may have violated the Student Disciplinary Code. Thereafter, Grant set a hearing before the Disciplinary Committee and on March 29 and 30, 1991, the Disciplinary Committee convened. At the hearing, McMillan was represented by two attorneys, presented evidence, and cross-examined witnesses. In a 5-2 vote, the Disciplinary Committee found that McMillan had violated the Student Honor Code. On April 4, 1991, the Committee made a unanimous recommendation to the Dean of the College of Law that McMillan be permanently expelled from the law school. On July 18, 1991, the Dean affirmed the findings of the Disciplinary Committee.

McMillan filed a complaint in federal district court seeking injunctive relief. The district court dismissed her complaint, finding no evidence of a violation of McMillan's right to equal protection and finding that the school had not violated McMillan's rights to procedural and substantive due process. For the reasons described below, we affirm the district.

We find that McMillan received sufficient process to prevent an erroneous deprivation. The record indicates that McMillan received notice of the charges that were being brought against her in a hearing before the law school's Disciplinary Committee. At the two-day meeting, McMillan was represented by two attorneys and had ample opportunity to present her evidence in considerable detail. Each side had an opportunity to call witnesses and present their version of the events. In addition, the record indicates that the Disciplinary Committee based their finding of academic dishonesty on sufficient evidence. This evidence includes the striking similarity between the final papers, testimony that indicated that Sara Rich finished her paper several hours before McMillan finished her paper, and that approximately one week prior to the due date, McMillan was seen leaving Sara Rich's room. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("All that is necessary is that the procedures be tailored, in light of the decision to be made, to the 'capacities and circumstances of those who are to be heard' [citation omitted] to insure that they are given a meaningful opportunity to present their case.").

McMillan also argues that she was denied due process because of bias on the part of Grant, the Disciplinary Committee Chair, and Timothy Sheriden, a student representative on the Disciplinary Committee.

Specifically, McMillan argues that Grant should have recused himself due to his prior involvement with the case and Sheriden should have been removed because of a prior altercation between Sheriden and McMillan. We agree with the district court's finding that while it might have been more prudent for Sheriden to be removed, this failure to remove Sheriden did not constitute a denial of due process to McMillan. In the university setting, a disciplinary committee is entitled to presumption of honesty and integrity, absent a showing of actual bias. *See Ikpeazu v. Univ. of Nebraska*, 775 F.2d 250, 254 (8th Cir. 1985). We find no evidence of actual bias in the record on the part of Grant or Sheriden.

McMillan also argues that the law school violated her constitutional right to substantive due process by arbitrarily and capriciously dismissing her from law school. *Ewing v. Bd. of Regents of Univ. of Michigan*, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 214 (1985). In order to prove that the law school's actions were arbitrary or capricious, McMillan must show that there was no rational basis for the law school's actions. *See Stevens v. Hunt*, 646 F.2d 1168, 1170 (6th Cir. 1981). From our review of the record, we can find no basis upon which to hold that the law school's actions were arbitrary or capricious. We find that the law school had a rational basis for dismissing McMillan. The record supports the Disciplinary Committee's finding.

For the foregoing reasons, we affirm the district court's decision.

ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT

(Filed August 30, 1991)

Case No. 5:91CV01634

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE McMILLAN,
Plaintiff,

vs.

ISAAC C. HUNT, JR., etc., *et al.*,
Defendants.

JUDGE ALVIN I. KRENZLER

ORDER OF DISMISSAL

This Court, having made its findings of fact and conclusions of law in open court and on the record, enters this Order of Dismissal dismissing the above-captioned case, with prejudice.

/s/ ALVIN I. KRENZLER
United States District Judge

John Quinn, Jr
J. Bruce Hunsicker

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(August 30, 1991)

Case No. 5:91CV1634

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACQUELINE McMILLAN,
Plaintiff,

v.

ISAAC HUNT, JR., ET CETERA, *et al.*,
Defendants.

EXCERPT TRANSCRIPT OF PROCEEDINGS, FINDINGS OF FACT AND CONCLUSIONS OF LAW, BEFORE HONORABLE ALVIN I. KRENZLER, ON FRIDAY, AUGUST 30TH, 1991, COMMENCING AT 10:30 A.M.

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Ted Mallo, In House Counsel
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[2] *PROCEEDINGS*

THE COURT: Okay. Be seated.

Let the record show we are here on the civil case of Jacqueline McMillan against Isaac Hunt, Dean of the Law School, William Muse, the President, and Board of Trustees of Akron University.

This Plaintiff filed a complaint in which she has raised constitutional issues of procedural and substantial due process as well as an equal protection argument. The Plaintiff also filed motions for temporary restraining order, preliminary injunction and permanent injunction.

We set the matter up for a hearing, and the parties submitted a variety of materials that I will review and am considering that this case was heard on the merits, and we will deal with the permanent injunction issue.

First of all, for the record, I am going to make my findings of fact and conclusions of law in open Court and on the record, and I will supplement that with a judgment. I am anticipating that there may or may not be an appeal. I am assuming there will be one. So the Sixth Circuit will know and understand what I had in my mind, I will express myself on every issue that was raised and we will go from there.

[3] First of all, the parties submitted a stipulation of agreed facts that I will read into the record.

Now come the plaintiff and defendants, and hereby submit the following stipulated facts for the purpose of the preliminary injunction hearing scheduled for August 24, 1991.

1. The plaintiff, as a first year student at The University of Akron School of Law, was enrolled in Basic Legal Communications (BLC). BLC is a legal writing course and the course work consisted of three research papers. Professor Richard Cohen was the professor for the course.

2. On January 23, 1991, Professor Cohen charged the plaintiff with a violation of the School of Law's Honor Code arising out of the third BLC research memorandum. Attached hereto as Exhibit "1" is a true and correct copy of Professor Cohen's Charge directed to Professor Richard Grant, Chairman of the Student Disciplinary Committee.

3. Attached hereto as Exhibit "2" is a true and correct copy of the Student Disciplinary Code.

4. Professor William Rich was appointed by Professor Grant to investigate the charge brought by Professor Cohen.

[4] 5. On February 28, 1991, pursuant to the Student Disciplinary Code, Professor Trant [sic], as Chairman of the Student Disciplinary Committee, determined that there was probable cause to believe that the plaintiff may have violated the Student Disciplinary Code. Professor Grant notified the plaintiff of the date of the hearing. Attached hereto as Exhibit "3" is a true and correct copy of the notice provided to the plaintiff by Professor Grant.

6. The hearing on the charge took place on March 29, and March 30, 1991. The plaintiff was represented by two attorneys at the hearing. Pursuant to the

Disciplinary Code, the plaintiff presented evidence and cross-examined witnesses. The parties stipulate and agree as to the transcript of the hearing.

7. The hearing took place before the Student Disciplinary Committee as described in the Disciplinary Code.

8. On April 4, 1991, the Committee issued its recommendation to the Dean of the School of Law. A true and correct copy of the recommendation of the Committee is attached hereto as Exhibit "4." The plaintiff does not admit to the truth of the findings of the Committee.

9. The Disciplinary Committee voted 5-2 to [5] find the violations of the Student Honor Code specified in Exhibit "4." The Committee voted unanimously to recollemd [sic] to the Dean that the plaintiff be expelled permanently from the School of Law.

10. Pursuant to the Disciplinary Code, the recommendation of the Disciplinary Committee was reviewed by the Dean of the School of Law.

11. On April 4, 1991, The University of Akron received notice of a charge filed by the plaintiff with the United States Department of Education, Office of Civil Rights, alleging that the plaintiff was treated differently on the basis of race. A true and correct copy of the notification of the charge is attached hereto as Exhibit "5."

12. On or about July 18, 1991, the Dean of the School of Law issued his decision affirming the findings of the Disciplinary Committee. A true and correct copy of the Dean's decision is attached hereto as Exhibit "6."

13. After investigation of the charge filed by the Plaintiff, the United States Department of Education issued its decision regarding the charge. The Department of Education found that the weight of the evidence did

not support the plaintiff's allegation of discrimination on the basis of race. A true and [6] correct copy of the findings of the U. S. Department of Education is attached hereto as Exhibit "7".

14. Attached hereto as Exhibit "8" is a true and correct copy of Jacqueline McMillan's third BLC research paper dated November 16, 1990.

15. Attached hereto as Exhibit "9" is a true and correct copy of Sara Rich's third BLC research paper dated November 16, 1990.

16. The parties agree that each of the documents marked as exhibits 1 through 9, be admitted into evidence, and it is signed by John Quinn, Counsel for Plaintiff, and J. Bruce Hunsicker, Counsel for the Defendants.

Attached are the "9" exhibit that I referred to and the stipulations which have been admitted into evidence. And the Court considered the stipulations and exhibits, all of which are admitted into evidence.

Just for the record, I want to make one other comment: Some of the stipulations and exhibits refer to the charge filed with the Department of Education and the findings of the Department of Education, and for the record, I want to state that those charges and findings are totally irrelevant as I am concerned.

I am only concerned with whether we have a due process-equal protection argument in this case, and, [7] therefore, what the Department of Education did or did not do doesn't control what I do. They were part of maybe a process, but it is totally irrelevant for my purposes.

And we have these exhibits here. Now, we also had submitted by the parties a stipulation of the disputed facts which—anyway, it is not really relevant.

Now, for the record, I want to point out that this is not a trial de novo. In other words, I am not taking the transcript which we have here as—one of exhibits—I will get to it in a minute, and I read the transcript of some 235 pages. We are not having a trial de novo nor is this to be considered as an appeal from a decision by the Dean of the Law School;

This is a Title 42, Section 1983 case dealing with a due process and equal protection issue. We have these nine exhibits which are joint exhibits. In addition, we have some other exhibits.

The Defendant, I believe, had 14 exhibits or so.

Did you have 11 exhibits?

MR. HUNSICKER: Eleven is what is in my memory, Judge.

THE COURT: I show 11 and have all of these exhibits, and the transcript of the hearing is [8] Defendants' Exhibit 1, 235 pages, and I have read that and considered that together with all of the exhibits.

This Court is not here to dispute judgment for that of the Committee or the Dean; it is just to determine whether this Plaintiff had due process and equal protection.

We heard a number of witnesses testify, the Plaintiff's witness, who is the Plaintiff herself, the Defendant having Professor Cohen testify, Professor Rich and Professor Grant and Dean Hunt.

First of all, as to due process, this Plaintiff had notice and an opportunity for a hearing. She was represented by counsel and she had a hearing. I would like to make several comments.

First of all, the Plaintiff moved that Tim Sheridan who was a student representative on the Committee not participate because he had some altercation with the

Plaintiff. He said that he could be fair, and the Committee thought he could be fair. It is this Court's view that Mr. Sheridan should have removed himself, but he didn't. But I am not satisfied that this denied Plaintiff a fair hearing or prevail on that issue alone.

It was also moved that Professor Grant who made the probable cause hearing be removed because it [9] likened, and I referred to that, the person that makes the probable cause is sort of akin to a Prosecutor and an Information and he shouldn't sit. And Professor Grant professed since he decided some of these cases the opposite way that would make it fair.

But I believe he should have excused himself because it gives the appearance of impropriety, but when Professor Grant started, he made a comment, he said, "The Defendant is represented by two attorneys." Well, that gives the aura of a criminal proceeding and I sort of resented reading that in this type of thing. I didn't look at this as being a person charged as a Defendant. Defendant denotes a criminal matter, and the whole attitude was one of haughtiness and arrogance like an inbreeding that they think has their professors do no wrong.

They teach students about due process and don't necessarily practice it. I am not saying they didn't have due process here, but the whole process borders on an academic arrogance attitude, and I find it somewhat offensive.

But the issue still is whether this Plaintiff did get due process.

Another issue involved that of the oath. It would be nice to have an oath. I think an oath could [10] have been given, but I don't think that an oath is necessary in the due process hearing.

I find that this Plaintiff was a first semester law student at the law school; that there were two basic papers or basic legal research class, and then the third paper is a research and writing assignment to be completed by each of the students.

There was some dispute about some types of rules or regulations in the talking about cases or assignment, but I do not find there was a violation of any such rule by this Plaintiff.

One Holly Levy who was the instructor in the course, and adjunct professor, noted similarities between the Plaintiff's assignment and her roommate Sarah Rich's assignment, and there was a roommate, Julie Rohr. The instructor contacted Professor Cohen who was the principal professor in this regard, and he conducted various interviews with all of the students and concluded in his mind there was something suspicious. He filed a complaint, which I believe is Exhibit 2 or 1, Exhibit 1—Joint Exhibit 1, I am sorry, which he sent to Professor Grant who said, "I have reason to believe that Jacqueline McMillan used another person's memorandum in preparing her third memorandum for basic legal communications. [11] Please appoint an investigator to look into this matter, Thank you."

Based on that, Professor Grant did appoint an investigator, Professor William Rich, to conduct an interview of the allegations, and he then submitted the investigation report to Professor Grant who then made the probable cause finding. Then they had the Committee hearing.

The Committee had available to it—there were eight students in the class. They had available all eight papers from all of the students, including the two from the Plaintiff and Ms. Rich. The Plaintiff appeared at the hearings with two counsel, and we have a 235-page transcript of the matter.

An issue was raised as to whether Ms. Rich also violated the code and whether she was not disciplined and, therefore, that would make an equal protection argument. That is based on what the code says, a student violates the code if he or she knows of conduct which he or she believes to be a violation and fails to give a full timely report.

I find there was no violation of that Ms. Rich. There was a question raised as to who copied from who, and the Plaintiff contends that Ms. Rich is equally as liable because they should have charged [12] her, and by not charging her the same as they charged Ms. McMillan that was an equal protection violation, and I find there is not sufficient evidence to say there was an equal protection violation in regard to failure to charge Ms. Rich.

Finally, the Committee voted 5 to 2 that Ms. McMillan had violated the code in four respects: Conduct which is dishonest, deceitful, unfair and otherwise inconsistent with high ethical standards of academic responsibility;

Failing to identify the extent of reliance on the work of another person;

Obtaining an unfair advantage in course work;

Making a false representation to a school authority by passing off another student's work as one's own.

The Dean then had everything before him, and he made findings of fact and conclusions of law—I'm sorry, findings of fact and conclusions of law came from the Committee, made findings of fact and conclusions of law. The Dean then made his findings of fact and conclusions of law, he signed it and that became the final decision.

There was no appeal to the President of the [13] University or to the Board of Trustees. I raised a question of whether that was a due process violation in

and of itself. For consideration, I think that that should be the process. It is for everything else in universities, but I do not find that that was a denial of due process or equal protection to this Plaintiff.

The Fourteenth Amendment of the United States Constitution provides for due process, and I find that after reviewing all of the stipulations and all of the exhibits and the transcript of the proceedings and the oral arguments and the briefs of the parties together with everything that there was not a due process violation or equal protection violation, and, therefore, I am going to dismiss the complaint, even though I am unhappy with some of the things that were done in regard to the hearing, some of the attitudes of some of the professors that bordered on haughtiness and arrogance and also the failure to remove Mr. Sheridan and Mr. Grant from the hearing.

Nonetheless, they didn't take away from both denial of due process and equal protection under the Fourteenth Amendment.

I believe I have said all I can say on this matter, and the transcript of my findings of fact and [14] conclusions of law will be available. If anybody wants to take an appeal, they are invited to do so. I think I put enough on there and gives everybody an opportunity to challenge it.

I want to say if there is anything else?

Okay. That's it.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

(Filed September 1, 1992)

No. 92-3843

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACQUELINE McMILLAN,
Plaintiff-Appellant,

v.

ISAAC C. HUNT, JR., etc., *et al.*,
Defendants-Appellees.

ORDER

BEFORE: MARTIN and SUHRHEINRICH, *Circuit Judges*; and KRUPANSKY, *Senior Circuit Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, *Clerk*